EASEMENTS, RIGHTS OF WAY AND TYPES OF TITLE

Easements

What is an easement? Black's Law Dictionary says the following;

A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement.

A. In Gross

An easement in gross is a personal interest in the land of another as distinguished from an easement that is appurtenant to another parcel and passes with title to that parcel. An easement in gross is a personal right and has no connection with other land. Easements for roads, utilities and railroads are examples of easements in gross. Another example is the case of an individual having a personal easement (an easement in gross) to use a well on the land of another. The easement encumbers the parcel containing the well just as an appurtenant easement would, but it favors the individual holding the easement and does not attach to other land.

B. Appurtenant

An appurtenant easement is one which gives the owner of one parcel certain specified rights over the land of another. It has a dominant tenement and a servient tenement. The dominant tenement is the one served by the easement and the servient tenement is the one that "serves" the other by permitting the use of its property.

An easement needed for the use of a parcel such as the easement for ingress and egress across parcel "A" in Figure 5.1 will pass with the conveyance of parcel "B" even though it is not stated in the deed. It attaches to parcel "B," but suppose the same person owns both parcels "B" and "C." It is then unclear whether the easement is appurtenant only to parcel "B" or to "B" and "C." Appurtenant easements should always state which parcel or parcels they are intended to serve, but a great many of them do not.

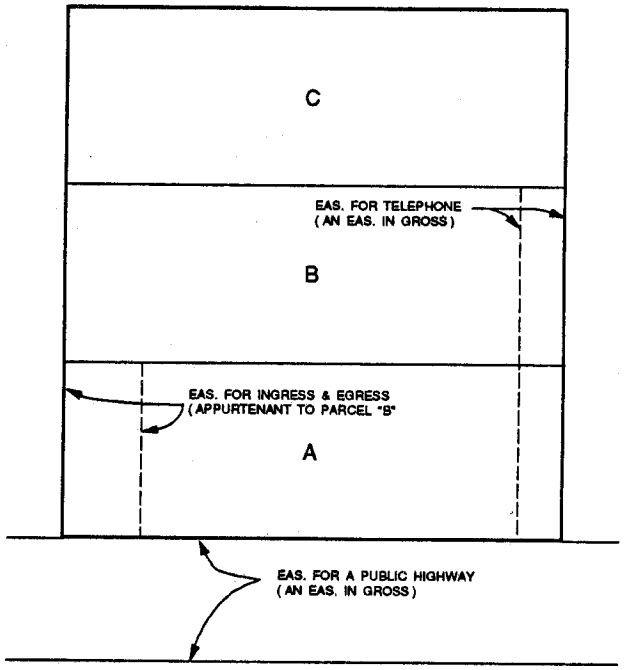


Figure 5.1

Appurtenant easements like the one shown in Figure 5.1 are important to us because we sometimes sever a parcel's only means of access to a public highway without ever touching the dominant tenement itself. We may require right-of-way in fee from parcel "A" as shown in Figure 5.2, but, in the process, we may sever the only access for several other parcels. Even if the other parcels having access over this easement have access to a public road by another route, we have damaged them and we must get a deed from them legally closing their access at our new right-of-way line. For this reason, it is important that we identify each and every parcel affected in this way. Title reports will not show them all. One clue as to the existence of an easement of this nature is physical evidence of use that would appear on a topo map.

C. Floating

An easement may state the width, but omit the location of the strip making it difficult or impossible to locate it. These are called "floating" easements. A fee deed like this would probably be declared void for lack of certainty, but an easement deed of this kind is legal. In the case of a utility easement, the location

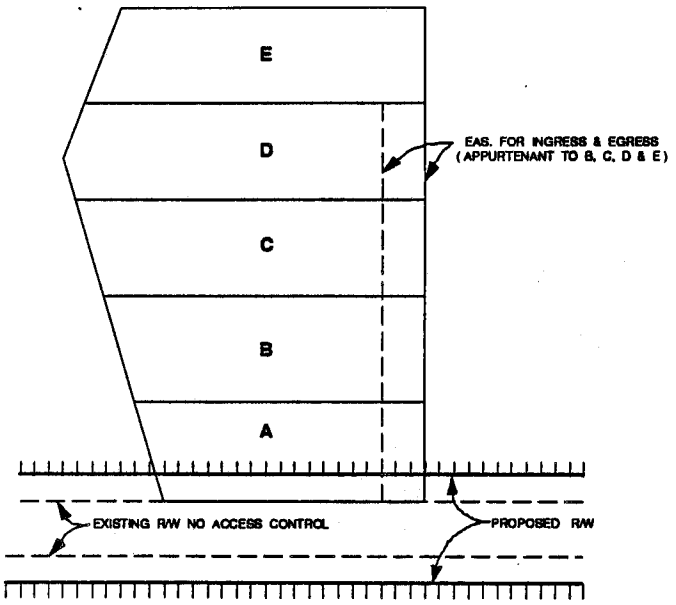


Figure 5.2

of the actual facility such as a line of power poles or a pipe line can be accepted as the intended location. Some easement descriptions call for an easement for some purpose without giving either width or location, but simply states that it crosses a given parcel. These are called blanket easements. When easements like these are found, a note should be placed on the appraisal maps stating the purpose of the easement and the fact that the exact location cannot be determined.

D. Prescriptive

The rules for acquiring an easement by prescription are the same as for acquiring land in fee by adverse possession except that it is not necessary to have been paying taxes on it and only an easement is acquired. It is not, of course, an easement of record until a court so decrees. People frequently say that they have a prescriptive easement across another's property when, in fact, they have some or all of the requisites for obtaining an easement, but have not been to court to secure it. Strictly speaking they have a prescriptive claim only.

A prescriptive easement is a limited right to use the land of another. An easement of this kind granted by a court for a foot path, because that is the way it has been used over the years, cannot legally be used for vehicular traffic.

An owner may obtain an easement for ingress and egress by prescription based on the use of the strip of land by one family. If he later subdivides his property and the traffic is increased a hundred fold, he has overburdened the easement.

We must recognize the existence of prescriptive claims that may ripen into valid easements if our new right-of-way requirements affect them. The appraisal agent must be informed so that he or she can determine whether or not the prescriptive claim is compensable. See Chapter 5 for further treatment of the subject of prescription.

E. Augmenting/Encumbering

An augmenting easement is one that augments or adds to the value of a fee parcel. In Figure 5.1, the easement for ingress and egress augments parcel "B" and encumbers parcel "A." The telephone easement encumbers parcels "A" and "B."

Rights of Way

The words "right of way" in a deed invariably convey an easement unless another intent is clearly apparent from other words in the deed. The words mean right of passage or right to cross over the land of another. In the case of a railroad, however, the term "right of way" means much more.

Strip Descriptions

Strip descriptions are frequently used in describing roads and utilities. The preamble will normally call for a strip of land of a given width over and across a certain parcel such as Lot 1. A description of the strip will then follow which will frequently begin and end outside the boundaries of Lot 1. The only portion conveyed is that part of the described strip which falls within Lot 1.

A. Prolongations

Problems sometimes develop when the centerline of a strip description has an angle point on a property line. Invariably, the angle points in the sidelines of the strip description will not fall on the property line and, depending on how the description is worded, a triangular shaped parcel will be added or missed. See Figure 5.3 for an illustration of this problem.

Reversion Rights

Some easements contain a clause that says, in effect, that if the easement ceases to be used for its intended purpose, title will revert to the grantor. Technically, the fee ownership does not change; only the easement which terminates. Title companies usually want something in the public record like a quitclaim deed to indicate the changed status.

Access Rights

Access rights that have been signed away by deed amount to a negative easement encumbering a parcel adjoining a public way and their existence and exact location are important to the appraiser. In some cases, access rights have been signed away except for openings in specified locations. These openings must be shown on the appraisal map.

Unrecorded Easements

A great many easements have been granted by the Bureau of Land Management and the Bureau of Indian Affairs on parcels before they were patented. In most cases, the easements were not recorded, but the patents were issued subject to "existing rights of way of record" or similar wording. The easements are valid and can be enforced, but, frequently the only place they can be found is at the Office of the Bureau of Land Management or the Bureau of Indian Affairs.

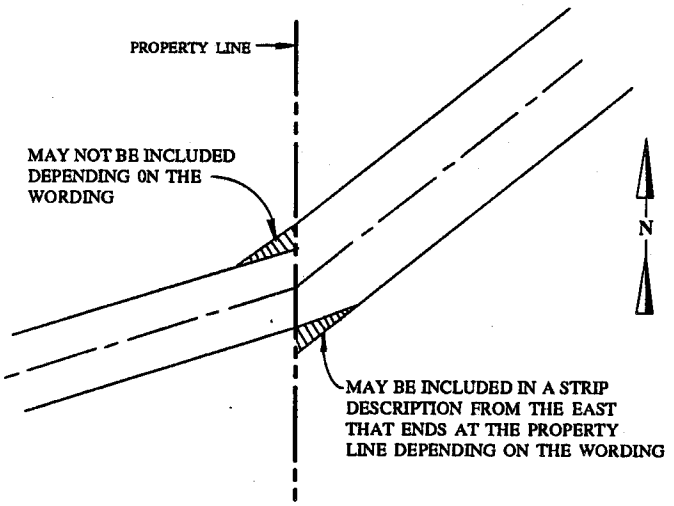


Figure 5.3

Types of Title We Acquire

The Department acquires or claims title in several different forms. For many years it has been the practice to acquire new rights of way in fee. However, in certain circumstances the Department accepts a lesser degree of title. Following is a discussion of a number of different types.

A. Fee

Fee may be defined as an estate of inheritance in land without qualification or restriction as to the persons who may inherit it as heirs. It is also called absolute fee or fee title. Historically, the English concept of fee title originated with fee title to all land in the realm vested in the Crown. Later, the Crown began deeding land to individuals in a manner that amounted to a life estate with title returning to the Crown upon the death of the individual. Still later, the Crown deeded land to individuals in "*fee simple absolute*." At last, individuals could own land, sell it to others, or pass it on to their heirs. As to the nature of "*fee title*," we sometimes hear people say "I own my land from the center of the earth to the heavens above." We feel constrained to add, however, "Subject to numerous rights granted to, or exercised by others to tunnel through, cross over, and fly above."

It has not always been possible for the State to acquire fee for a road. Prior to September 15, 1935 a deed to the State and accepted "*for a road*" or "*for road purposes*" created only an easement no matter what language was used in the deed. Cities and Counties could not accept fee for a road until 1955 when Section 905 of the Streets and Highways Code was amended.

Most of the land we acquire in fee is acquired by a grant deed. Some, however, is acquired by Final Order of Condemnation (FOC) in cases where it was necessary to go to court. More about this later. The reason for the Department's preference of fee title is primarily economic. The cost to obtain an easement could be almost as much as to obtain fee, particularly if it's for an access restricted facility. Another economic consideration is the lack of total recovery value from an easement. An example of the lack of recovery value is on a rescinded route whose right-of-way is held in easement. The easement would have very little value on the open market because of the restriction that it be used for transportation purposes. About the only avenue open to the Department for recovery of capital outlay would be by sale to the underlying fee owner. However, the Department probably would not recover its total investment.

With fee title the Department has unrestricted use of the land. If the land ceases to be required for the operating right-of-way

it would fall under the restrictions of the local zoning ordinances, just as any privately owned land.

B. Permanent Easement

Some agencies will only grant easements so that they may retain the underlying fee. Following is a partial list of these agencies:

1. *U.S. Forest Service.*
2. *U.S. Bureau of Land Management.*
3. *Department of the Interior (certain Indian lands).*
4. *State Lands under the control of the State Lands Commission.*
5. *Railroads - over their operating right-of-way only.*
6. *A few land companies.*

An interesting comparison between fee and easement deeds is given in the book, "Real Estate Law in California," 7th edition, by *Bowman* and *Milligan*. On page 318 they say "*An important distinction applies, however, with respect to the description contained in an easement and a description contained in a deed. A deed conveying fee title to an indefinite strip of land would be void for uncertainty, but a deed to an unlocated easement (floating easement) is valid.*"

There are a few instances where an easement best satisfies the Department's needs. Areas required for slopes or drainage facilities outside the major portion of the right-of-way needed for the highway is an example. An easement is restrictive in nature in that the land can only be used for the purposes called out in the degree of title being conveyed. In the case where the Department acquires an easement for transportation purposes the Department may construct, operate and maintain anything that is necessary to the operation of the facility. However, if the Department wants to utilize the land for purposes other than transportation it would have to obtain an additional easement for that specific purpose.

Many miles of highway constructed in earlier years are on right-of-way that was acquired as easement. This holds true for much of the highway right-of-way taken into the system in 1933 from the cities and counties.

The Department acquires a variety of permanent easements designed to fit certain specific needs. Some have already been mentioned. Following is a partial list of the different types together with a brief description of each:

1. Road Easements

As mentioned previously, permanent road easements are acquired from some owners, primarily government agencies and railroads. As easements they give us a limited right to use the land for a "road," whatever that includes. It obviously includes the traveled way, shoulders, ditches, slopes and necessary drainage facilities, but how about gravel pits, offices, shops, storage yards or non-motorized transportation facilities? The Streets and Highways Code, Section 104 includes the latter as purposes for which land may be condemned for state highway purposes. Courts have ruled that a road easement includes the right to install and maintain utilities. "*Road purposes*" would not, however, include such activities as police stations or agricultural inspection stations. If the land were acquired in fee, we could use it for anything, and, of course, we could sell it when it is no longer needed. A road easement could cost nearly as much as fee and the resale value could be low, possibly even zero.

We frequently encounter deeds with the term "*right of way*" in the words of conveyance and no mention of easement or fee. The term "*right of way*" usually means easement, but there are subtle differences. Black's Law Dictionary has this to say about right of way:

Term "right of way" sometimes is used to describe a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their roadbed, and, when so used, the term refers to the land itself, not the right of passage over it. ---

--- As used with reference to right to pass over another's land, it is only an easement; and grantee acquires only right to a reasonable and usual enjoyment thereof with the owner of soil retaining rights and benefits of ownership consistent with the easement.

The California Civil Code deals with the subject of rights of way. Section 801, titled "Easements; servitudes attached to land" says the following:

The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

---4. The right of way;---

Section 802 of the same Code, titled "Servitudes unattached" adds the following:

The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

---Five-The right of way.

Section 801.7 of the same Code, titled "Extent of railroad right-of-way;---" indicates that a railroad right-of-way is special. Here is what it says:

(a) When a right-of-way is granted pursuant to Section 801 or 802 to a railroad corporation whose primary business is the transportation of passengers, the grant shall include, but not be limited to, a right-of-way for the location, construction, and maintenance of the railroad corporation's necessary works and for every necessary adjunct thereto.

The Supreme Court of the United States has ruled on the nature of a railroad right of way. In Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540, at page 570, 25 S. Ct. 133, 141 (49 L. Ed. 312) the court said:

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement.

It is apparent that the term "*right of way*" sometimes means more than an easement. One court case in California dealt with a deed to a railroad that began talking about "*land*" and later referred to "*said right of way.*" The court ruled that "right of way" does not always mean easement.

A deed dedicating a right-of-way to a public agency may well convey fee depending on the wording. The fee, however, would probably be fee determinable, or fee that would revert to the grantor if and when the land ceased to be used for its intended purpose. In other words, the public agency could not close the street and sell the land. There seems to be no easy way to determine whether fee or easement was conveyed. It depends on the intent expressed in the conveyance and many times only a court can say what that is.

2. Slope Easements

A slope easement is a permanent right to construct and maintain a slope on land abutting upon the right-of-way for a transportation facility. The slope is needed for the support of the facility and must remain in place as long as the facility is there unless the abutting owner wants to grade his land in such a way as to eliminate the need for the slope. Thus, in a cut slope situation, there would be no need for us to retain a slope easement if the owner is going to grade his land down to the elevation of the right-of-way line. In the case of a fill slope, the owner may propose cutting back the slope and building a retaining wall. In each case, the Department would eliminate the easement providing that the owner's plans meet with our approval. A "*slope clause*" indicating our willingness to do this may be included in slope easement documents we prepare.

The rights we acquire with a slope easement are limited to constructing and maintaining slopes. We do not have the right to construct drainage facilities or anything else on an area covered by a slope easement.

These easements can be acquired on a grant deed form when fee is also being acquired from the same owner or they may be acquired on an easement deed form. A very common situation occurs where we acquire some land in fee from an owner and an adjoining easement for slope or other purposes.

Typically, a deed for such a transaction would be a grant deed containing two parcels. Parcel 1 would describe the fee portion and Parcel 2 would describe an easement for slope or other purpose.

When the easement area falls on a State-owned excess parcel, the easement is created by reserving it to the State when the excess is conveyed by Director's Deed to a buyer.

In this situation, prior to the sale, the State owned a parcel of land in fee, only part of which is needed for right-of-way for a transportation facility. The State conveys the excess, in fee, to a buyer, but retains an easement, in this case for a slope. The easement is created with the recording of the Director's Deed.

3. Drainage Easements

A drainage easement is a permanent easement granting to us the limited right to construct and maintain drainage facilities on a parcel adjacent to our right-of-way. Again, we cannot build anything else on the property without acquiring an additional right to cover it.

Here, as with slopes, the easement may be created on a grant deed form, as above, or an easement deed or by means of a reservation in a Director's Deed.

4. Footing Easements

State sound walls are erected inside our right-of-way line and sometimes the footing extends over the right-of-way line onto the adjoining property. When that happens, it is necessary to secure a right to place the footing there. This is done with a footing easement which costs much less than fee.

A footing easement is a permanent right to construct concrete footings, perhaps for a sound wall, on an abutting owner's property.

5. Abutter's Rights

An owner of land that abuts on a transportation corridor has certain "*abutter's rights*" that affect the creation and operation of our transportation facility. We are talking here about the rights of owners whose property abuts upon a public transportation facility, not abutter's rights between private parties. These rights include such things as the rights to light, air, view and the right of access to and from an existing transportation facility. It is sometimes in our best interest to acquire some or all of these rights from the abutting owners. When we acquire all abutter's rights from an abutting owner, we effectively negate that owner's legal right to get on or off the transportation facility directly from his or her remaining property. We also acquire his or her remaining rights pertaining to light, air, view, etc.

An abutting owner's right to light, air and view to a road is legally recognized and has value. They are separate and distinct from an abutter's right of access to a public transportation facility. The R/W Manual has clauses that will take access rights alone or access rights and "*all other abutter's rights*" as we desire. The practical result of using a clause that takes all abutter's rights (DFA clauses) instead of access rights only (DF clauses), can be dramatic.

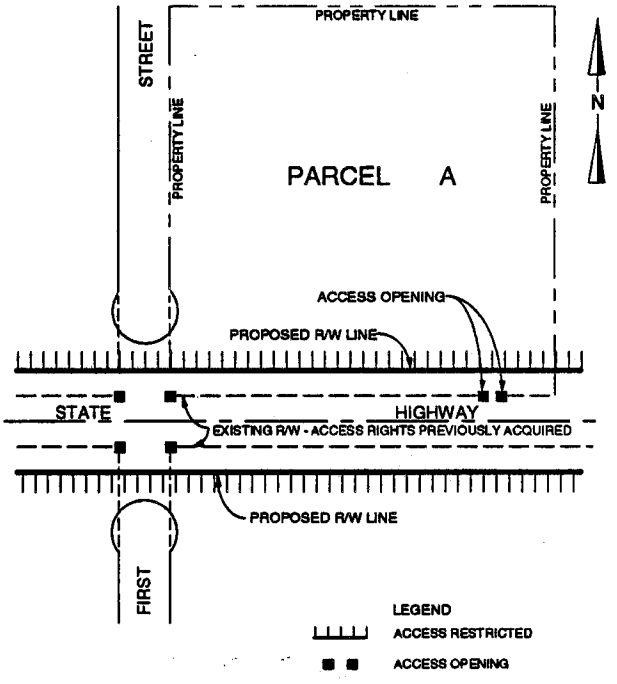
The Department went to court with an owner in District 11 in 1987 (Peo. vs. Posada, Ltd.), and the right of view was an issue. A retaining wall for a new ramp was being built and the owner objected that it obstructed the view from the remaining property. It did, indeed, but in a previous deed to the State in 1959, the owner had released and relinquished "*any and all other abutter's rights, other than access, appurtenant to said remaining property in and to said freeway.*" The Department won.

Also, in 1987, a large bank, owner of a high-rise building close to the interchange between Interstate 8 and State Route 163 in San Diego, protested that a new freeway ramp under construction was obstructing their view. They wanted to be compensated for it, but a Department attorney, *Sherman Hollingsworth*, pointed out to them that their abutter's rights to "light, air and view" had been acquired years ago in a previous transaction. The bank managers did not like it, but they understood the facts and accepted them as they were.

When we say we have acquired "*access rights*" from an adjoining owner we mean that we have removed or restricted the abutting owner's easement of access to the transportation facility. We have not acquired any positive right to enter upon and use the land in any way. Rather, we have acquired a negative right, restricting the abutting owner from exercising the positive right he or she once had.

That negative right that we have acquired is enforcable only where the language of the document places the restriction. Exceptions were sometimes deliberately described to allow access to the transportation facility only at certain places such as shown in Figure 5.4. These are common on expressways. In the picture, First Street crossed the expressway at grade with access to the expressway legally open on both sides where the street crossed. In addition, there was a small access opening near the east end of parcel A.

When the expressway is to be converted to a freeway and additional right-of-way taken as indicated on the drawing, the appraisal map must show the existing situation, namely that the owner of parcel A has legal access to First Street which has legal access to the expressway and the owner also has legal access to the expressway through the small opening near the east end of the parcel. These facts are important to the appraiser and it is



THIS DRAWING SHOW AN EXPRESSWAY ABOUT TO BE CONVERTED TO A FREEWAY. THIS EXISTING ACCESS DENIAL LINE IS A NEGATIVE EASEMENT ENCUMBERING PARCEL "A". THIS EXISTING ACCESS OPENING NEAR THE EAST END OT THE PARCEL IS EASILY OVERLOOKED, BUT IT IS VITAL THAT THE APPRAISER KNOWS ABOUT IT.

Figure 5.4

the retracement surveyor's responsibility to show them.

6. Aerial Easements

Strictly speaking, an aerial easement is a right granted to one owner to do certain things in the air above the land of another with no rights to occupy the ground at all. Some examples of this would be a utility easement for overhead wires with no provision for poles or towers on that particular parcel. Another would be for a viaduct or bridge over a parcel such as a railroad with no supporting columns resting on that parcel. Still another would be on a parcel in the landing pattern adjoining an airport. In the first two, the owner of the easement has the right to suspend wires, a bridge or other structure over the parcel, and in the third case the owner of the easement can fly planes over the parcel at certain specified elevations, make noise and produce dust and fumes. In this sense, an aerial easement is a negative right.

All three examples are negative easements, in that they restrict the owners of the property from doing things that they could have done if the easement did not exist. Thus, they are restricted from erecting buildings, antennas or structures of any kind high enough to interfere with the easement. The same holds true of trees or other vegetation. The easements may include other restrictions against the owner dealing with smoke, fumes and the storage of explosives or flammable material. The easements may also include the right to enter upon the parcel, if necessary, to enforce the terms of the easement.

Most aerial easements, however, are a combination of air and ground rights, including the right to install and maintain poles, towers, bridge columns or other structures on the land in addition to the strictly aerial rights. A recently acquired one was worded like this.

An easement and right-of-way to construct, replace, inspect, maintain, repair, operate or remove an overhead freeway bridge and highway, supporting columns and footings, including any and all appurtenances thereto, over, under, upon and across the following described real property --- Together with the right of ingress and egress in and to the above described parcel from the adjacent properties to maintain and repair said freeway facilities---.

The document included a number of provisions and restrictions designed to spell out the rights of the grantor and the grantee. The State acquires an easement giving us the limited right to do certain specific things on or above the property. The grantor retains the right to do anything he or she likes with the property that does not conflict with the easement. In this case, the grantor can construct a building under the bridge, but cannot store or manufacture flammable or explosive substances, nor can he or she produce smoke, fumes, vapors, etc. which would create a hazard to the traveling public.

The term, "*air rights*" is used in connection with the practice of selling the right to use the ground and air space under bridges. Most of these are for parking, but some are used for storage facilities, offices and even restaurants. Most, if not all of these are leases, rather than easements, but, again, the rights and responsibilities of each party are carefully spelled out.

7. Non Motorized Transportation Facilities

Section 156 of the Streets and Highways Code describes a non motorized transportation facility as a "*facility designed primarily for the use of pedestrians, bicyclists, or equestrians. It may be designed primarily for one or more of such uses.*" They are used primarily for bicycles, but, as we have seen, they are not limited to that. Motorized vehicles of all types, however, are excluded. Easements are normally acquired for these facilities.

These easements can be acquired on a grant deed form in conjunction with a fee taking or on an easement deed form. Many times they are acquired by reserving an easement to that effect in a Director's Deed when we convey excess land to others. The reservation statement or clause would include a description of the strip to be encumbered by the easement.

8. Scenic Easements

A scenic easement contains both positive and negative rights. It gives the positive right to enter upon the land of another and do work "*to preserve, protect and improve, where necessary, for scenic purposes.*" It also produces a negative right by preventing or restricting the grantor from "*any future development which may tend to detract*" from the scenic purpose of the easement. Thus, the grantee may enter upon the easement area to do certain things such as perform erosion control, cut or trim bushes and trees and clean up and remove junk and debris, all for the purpose of preserving or improving the scenic nature of the easement area. Conversely, the grantor is restricted from doing anything with the land that will detract from the scenic purpose of the easement.

The cost of acquiring a scenic easement, however, is very high, in fact, nearly the same as fee because the land is so heavily encumbered. As a result, they are rarely used.

9. Utility Easements

Utility easements normally describe a strip of land for use by that particular utility plus the right of ingress and egress across the grantor's remaining property. They also usually include the right to cut brush, trim trees and exercise other controls designed to protect the utility. An easement of this type, therefore, encumbers more than the narrow strip of land itself.

The construction of new transportation facilities or the widening of existing ones create conflicts with existing utilities, most of which need to be relocated. When an existing utility easement runs across the path of the transportation facility and a decision has been made to leave the utility in place, a Consent to Common Use Agreement (CCUA) is signed with the utility company. This agreement describes the portion of the existing easement that will fall inside the right-of-way and the two parties agree to use it in common, each respecting the rights of the other.

If it is decided to relocate the utility to cross the Department's right-of-way at a more convenient place, and, possibly, on a better alignment, a Joint Use Agreement (JUA) is signed with the utility company. This is the same as a CCUA except that the utility is relocated. The utility gets the same rights they had at the old location, however, as in the CCUA, they agree to allow the Department to use the same area with each respecting the other's rights. The description includes only that portion of the utility easement that lies within our right-of-way.

Those portions of utility easements that are relocated outside the right-of-way are usually placed next to our right-of-way. They are appraised and acquired, usually on forms provided by the utility company so that the title passes directly from the owner to the utility. However, the Department can acquire the necessary rights by condemnation and then, in turn, convey them to the utility company. Utility companies have the power to condemn, but they are reluctant to use it, especially when the need arose from the design and construction of a state transportation facility.

In some cases, the utility crosses a State-owned excess land parcel. The State should convey the easement to the utility company in these cases before selling the excess. Otherwise, the State would convey the excess to the buyer and reserve a utility easement. Then, after the fee has been conveyed, the utility easement would be conveyed to the utility company.

10. Private Easements

Private right-of-way easements are sometimes acquired to mitigate damages resulting from taking access rights for a freeway. For instance, the Department may acquire the only legal access to a large parcel leaving a large landlocked remainder. We are faced with three choices: pay damages, buy the entire parcel, or provide access to the remainder in some other way. It is frequently advantageous to acquire a private road easement appurtenant to and for the benefit of the "landlocked parcel." This does not create a public road. In fact, the easement is in favor of and for the benefit of only the grantees named in the document, i.e. the owner(s) of the landlocked parcel(s), and their successors or assigns, thus making it an appurtenant easement.

The private right-of-way easement description is put on an easement form with title passing directly to the owners of the parcel(s) that will benefit from it. This may include the Department. The Department may be a grantee if the parcel it is designed to help is state-owned excess land. Adding a private road to provide access increases the value of an excess land parcel.

C. Temporary Construction Easements

Temporary construction easements are acquired for many purposes to meet needs that are only temporary such as detours and to provide working room for construction equipment.

The basic difference between a permanent and temporary easement is the stated or implied time limit. It is Department policy to have a termination date shown in the temporary easement deed. There are several reasons for this policy. It makes for a more accurate appraisal and a clearer understanding between the parties during negotiations. In the past, many temporary easement deeds had no termination date or occurrence of stated condition in the document.

If a termination date is omitted, a second deed has to be processed and recorded by the Department to clear the cloud on the title. Some earlier deeds showed "*at completion of construction*" as the termination date. The completion of construction date is never recorded, therefore never becomes part of the public record. The title companies have no way of picking up the date of termination. A quitclaim deed would have to be processed and recorded to clear title, and, if the easement is still needed, a new deed processed to convey to us the rights we need.

D. Prescriptive Easements

In the early 1930's when the State absorbed many miles of county roads into the highway system, it also received all right, title and interest the county had in the right-of-way that was in use at that time. Some of the right-of-way was not covered by

a recorded document. The counties had only a prescriptive claim to it.

In other cases, the highway was constructed partially outside the recorded right-of-way. There are other factors that contribute to this type of situation that result in bits and pieces of the operating facility being outside the recorded right-of-way. The areas outside the recorded right-of-way are held by claim of prescriptive right.

Prescriptive right is the limited possession or use of another's land, as stated in Chapter 4, which vests certain rights in the user of the land. There are certain conditions that must be met before a claim of prescriptive right for highway purposes can be recognized. These conditions require possession to be actual, visible, exclusive and continuous for five years to create a bar under the statute of limitations.

The Department's claim of prescriptive right to a highway right-of-way has historically been acquiesced to by the underlying fee owner. As a result, the right-of-way continues to be held without a document of public record. If our claim was challenged by the underlying fee holder, a court would determine the extent of the prescriptive right. In our case, the prescriptive right for highway purposes would take the form of an easement, but would be much more limited than a recorded permanent easement for transportation purposes.

The limitations are significant. For example: The State has a two lane facility on a prescriptive right-of-way. Fences are 100 feet apart and an old map such as a Record of Survey or a Road Survey shows a right-of-way 100 feet wide. However, there are no deeds and no statement on the map dedicating right-of-way so the 100 foot width can best be described as an implied right-of-way. The Department begins construction to widen the shoulders and all improvements are within the implied hundred foot right-of-way. The underlying fee holder could go to court and attempt to get an order to stop the construction because the construction violates the conditions of prescriptive rights.

If the underlying fee holder does not become aware of the construction until after it is completed, he can initiate court action anytime within five years and ask for damages for the added burden to the land because we had violated the conditions of the prescriptive right. If the court found in favor of the fee holder, the only recourse the Department would have would be to pay the damages or acquire the right-of-way in fee or permanent easement and pay fair market value.

The widening of shoulders would only jeopardize the prescriptive right across parcels where the construction took place. In the case of an adjacent parcel where no construction took place, the prescriptive right would be secure.

Basically, the Department can maintain and operate the existing facility. It should not change its function or character.

Since prescriptive rights are not recorded and therefore not part of the public record, title companies would not normally pick them up. Title reports will be silent on prescriptive right-of-way across subject parcels. If a court of law has upheld a prescriptive right claim, the court's decision becomes part of the public record. As such it would be picked up by the title company and would appear as an encumbrance on the subject property.

We should try to get a deed for the areas we are occupying on a prescriptive basis when it is convenient to do so. When we are acquiring right-of-way from an owner and we have a prescriptive right-of-way that extends beyond the limits of the new take, it is usually an easy matter to acquire the rest of the area occupied on a prescriptive basis by including it in the description of the take.

E. License

A license is a mere immunity from liability for trespass. It is a personal privilege, cannot be passed on to others and can be terminated at will. It is not a right in land like an easement. If, however, the licensee spends enough time and money on the land, the license can become the equivalent of an easement and may even become irrevocable.

In years gone by, a number of licenses were acquired for highway rights of way, particularly on U.S. Forest Service land. The Department rarely acquires a license today, and then only for unique needs. In one recent case, the Department had an easement for a road from the Forest Service and decided to add a roadside rest in the right-of-way. The Forest Service took the position that the easement for a road did not include the right to build a roadside rest so a separate "*license*" was obtained to cover it. Another recent use of a license was to permit the Department to build and operate a radio relay station.

F. Waivers

There are times when no land is being acquired from an owner, but where we may be damaging him because we are changing the grade of an adjoining street. In cases like this we would pay for and acquire a waiver from the owner in which he or she would waive any claim for compensation against the State for any and all damages in any way resulting to the property by reason of the construction, maintenance and/or change of grade

of the street adjoining his property.

A similar clause is used in all other acquisition deeds except total takes or where all abutter's appurtenant rights are taken with the DFA series of clauses.

G. Reversionary Rights

Director's deeds conveying excess land to public agencies for public purposes sometimes contain a clause that calls for title to revert to the State if the land ceases to be used for the public purpose stated in the deed. This is usually limited to a specific period of time, such as ten years. This could be fee or easement. In general, reversionary clauses are undesirable in Director's Deeds because they prevent the local agency from making necessary alignment changes.

We sometimes get deeds from railroads and certain federal government agencies containing the same kind of clause, such as "If at any time the above-described land should cease to be used for a road, title shall immediately revert to the grantor."

There have been occasions when a realignment created some excess that seemed sure to bring in a lot of money. A closer look at the deed revealed that since we were no longer using the land for a road, title reverted to the grantor.

H. Dedication and Donation

It is not always necessary to pay for land needed for right-of-way. It is sometimes dedicated to the public and accepted by a public agency; offered for dedication and not accepted at this time; or donated and accepted.

In the first case, it may be by deed or on a subdivision map. The third case would be by deed. Both of these techniques result in valid easements or, in some cases, fee determinable with fee reverting if and when the land ceases to be used as intended.

The second scenario is sometimes known as an "irrevocable offer to dedicate." This, in itself, does not create an easement. For an easement by dedication to be valid, it must be offered for dedication by the lawful owner of the land and it must be accepted by a public agency for use by the public. Every member of the public then has an interest in it. However, an offer to dedicate can be accepted by the public agency at any time.

A Donation Deed transfers title without payment. It is prepared like any other deed with the words "*Donation Deed*" typed across the face of the form.

Acquiring Subordinate Interests

Acquiring right-of-way for a project is nearly always more involved than simply getting a grant deed from the owner(s). Others have easements giving them certain rights on the parcel and still others hold trust deeds as security for loans.

In some cases, one person is the record owner of the land while another has a "*claim*" of sorts to the land. The claimant may be an allottee on Indian lands or a holder of a life estate. In the case of allotted Indian lands, the underlying fee is held by the Bureau of Indian Affairs in trust for the Indian allottee(s). The allottee can acquire fee title to the land if and when certain conditions are met. Until then, the allottee is merely a claimant.

A life estate is a little different. A life estate can be created by owner A selling a parcel of land to owner B, reserving to owner A a life estate on all or part of the parcel. Owner B then owns the remainder, while owner A is, in effect, the owner of the life estate parcel until his or her death at which time the life estate is terminated and owner B owns the entire parcel.

All of these rights and claims need to be cleared when we are acquiring right-of-way for a project. We normally acquire the underlying fee with a grant deed. There are exceptions, such as the Indian lands we have just mentioned. In this case, we would acquire an easement or right-of-way from the Bureau of Indian Affairs which has the fee and get a quitclaim deed from the allottee who has an interest in the land that could ripen into fee.

A quitclaim deed may also be used to clear easements of all kinds and even life estates, although a life estate may be cleared by having the owner sign a grant deed along with the owner of the fee. A common and very typical use of the quitclaim deed is to clear leases such as those used by advertising companies for advertising signs.

Trust deeds encumber a parcel and need to be cleared. If the parcel being acquired is a total take, the trust deed is cleared with a Full Reconveyance. In the case of a part take, a Partial Reconveyance is used to clear the trust deed from the portion of the parcel that we are acquiring in fee. The reconveyance documents simply remove the trust deed from that portion of the parcel described in the document.

In most cases, the description used in the Full Reconveyance is the same as that used in the grant deed. Likewise, the description used in Partial Reconveyances is usually the same as that used in the fee portion of the grant deed, except for rewording of the access clause, if there is one. There are cases, however, where the trust deed encumbers less than the portion we are acquiring.

In this case, the description may have to be modified.

It is not necessary for us to actually remove a trust deed from areas that we are acquiring only in easement, but it is our policy to subordinate them to easements we are acquiring. Subordinating, in this case, simply means placing the trust deed, which was dated before our easement and thus had superior rank, in a "*subordinate*" position relative to our easement. If we had not acquired a Subordination Agreement and there was a foreclosure, our easement would have no effect on the new owner.

Right of Entry

A Right of Entry is a contract between the State and an owner permitting the State to enter upon the land and perform certain acts. It is used for parcels that are needed and will be acquired for a project. The big advantage is that it can be acquired in a hurry. One disadvantage is that it is not an encumbrance on the land; as a result, if the owner sells the land before we need it, the new owner is not obligated to honor the agreement.

Permit to Enter and Construct

A Permit to Enter and Construct is used in situations where we are not acquiring any permanent rights, but where we are doing something to an owner that would make us liable for damages such as cutting off an existing driveway. We could either pay damages and let the owner rebuild the driveway or we could do the work ourselves. If we are to do the work ourselves we need the right to "*Enter*" the owner's land and "*Construct*" the necessary improvements. This is done with the "*Permit to Enter and Construct.*" The purpose is to mitigate damages.

The Acquisition portion of the R/W Manual, Section 403.107 says the following: "*When temporary rights are needed to perform work for grantor's benefit, a Permit to Enter and Construct or Construction Permit may be used. These documents provide no permanent rights to the State and may be used when we would not condemn the rights secured.*"